

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 75-1011

To be argued by  
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ALPHONSE M. MEROLLA  
and THOMAS McNAMARA,

Appellants.

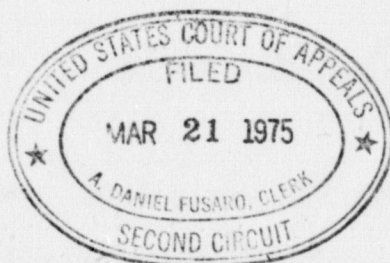
*BJS*  
Docket No. 75-1011

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APPENDIX TO THE BRIEF  
FOR APPELLANT MEROLLA

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
ALPHONSE M. MEROLLA  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,  
Of Counsel

1

TITLE OF CASE

THE UNITED STATES

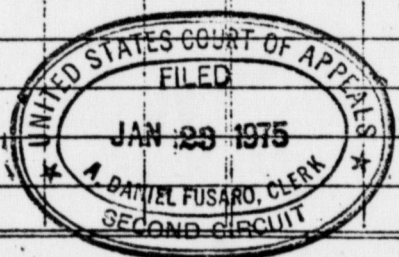
vs.

☒ JOHN DE LISO,  
JOHN MC NAMARA,  
☒ THOMAS MC NAMARA,  
☒ ALPHONSE MEROLLA,  
☒ ANGELO MEROLLA, and  
☒ ROCCO MEROLLA

For U.S.: J. McNAMARA :  
GRUNEWALD, TURK & GILLEN  
16 Court Street, Bklyn, N.Y.  
(858-6464)  
for deft. T. McNamara  
Leonard J. Msiselman  
170 Old Country Rd  
For Defendant: Mineola, NY.  
516-248-2400

Interference with commerce by extortion.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, (Thomas McNamara)	5000 00	1-3-75	Notice of Appeal (no fee)		
Clerk,			Alphonse Merrolla		
Marshal,		1-14-75	Notice of Appeal / Thomas	5-	5-
Attorney,		1-15-75	Paid to Treas / McNamara		5-
Commissioner's Court,					
Witnesses,					



DATE	PROCEEDINGS
5-2-73	Before Judd J- Indictment sealed by the Court - Bench Warrant Ordered.
5-2-73	<del>By Judd J</del> Bench Warrant Issued.
5/8/73	Before DOOLING, J.- Case called- Sealed indictment ordered open by the Court-Deft T. MC NAMARA not present in hospital-Bench Warrant cancelled -Defts JOHN DEELISO, ALPHONSE MEROLLA, AGNELO MEROLLA and R. MERROLLA and counsel present-(and deft J. MC NAMARA)-Defts produced on a bench warrant and arraigned and enter pleas of not guilty-Defts to post a P.A. Bond in the amounts of \$10,000.00 -Bail limits as to ALPHONSE MEROLLA extended to include Penn. upon prior notice to govt-Deft ALPHONSE MEROLLA to surrender his Passport to the U.S.-Bail limits to J. MC NAMARA to be extended upon prior notice to govt.-Initial conference scheduled for 6/8/73



73 CR 442

DATE	PROCEEDINGS
5/8/73	Bench Warrant ret'd and filed. Executed as to all deft but T. MC NAMARA.
5/8/73	Notice of Appearances filed (for defts T. MCNAMARA and R. MEROLLA)
5/17/73	Before DOOLING, J.- Case called- Deft T. MC NAMARA not present-Counsel J. Hoey present-Deft in hospital-Pleading adj'd to 5/24/73 .
5/17/73	Notice of Appearance filed. (for deft MC NAMARA)
5-24-73	Before DOOLING J - Case called - Deft McNAMARA & counsel Joseph Hoey present - deft arraigned and enters a plea of not guilty - Bail continued
6-1-73	Notice of Motion filed for Bill of Particulars, Inspection, etc. & Memo in support of pre trial motions (deft McNamara)
6/1/73	Notice of Motion filed for Discovery and Inspection , etc. & Memo in support filed.
6/1/73	Notice of Motion filed, re: Bill of Particulars, Inspection, etc. (deft ANGELO MEROLLA and ROCCO MEROLLA)
6/4/73	Notice of Motion filed, ret. 6/8/73 filed. re: Bill of Particulars (J. MC
6/7/73	Before DOOLING, J.M - Case called- XXXX Conference held and concluded- Order of defendant's motion for bill of particulars and for discovery granted and denied: Hearing on deft MC NAMARA's motion set for 6/14/73-Trial set week of 1/7/73
6/7/73	Notice of Appearance filed. (J. MC NAMARA)
6/14/73	Before DOOLING, J.- Case called- Motion for Discovery, etc. granted in part and denied in part-Deft T. MC NAMARA's motion for severance denied.
6-18-73	By DOOLING J - Conference Memorandum Order filed granting and denying motions for Discovery, Bill of Particulars, etc. (see Memo)
	Trial date Jan. 7, 1974, must be emphasized that in this case the highest importance is attached to making sure that the trial is brief, and that means an exhaustive set of pre-trial hearings will, if necessary, be devoted to reducing the order of magnitude of the proofs.(DE LISO, ANGELO ROCCO & ALPHONSE MEROLLA)
6/25/73	By DOOLING, J.- Order filed, that the trial will commence on Jan. 7, 1974 (JOHN DE LISO, , et al)
6-28-73	By DOOLING J - Order filed on motion of deft McNamara for Bill of Particulars and Discovery, granted and denied in part: motion for severance is denied without prejudice to renewal, etc. Trial date is January 7, 1974 in court room #8.
7/3/73	Stenographer's transcript of 6/14/73 filed.
10/2/73	Govt's Bill of Particulars filed
10-26-73	Govt's Notice of Readiness for Trial filed

1-7-74	Before DOOLING J - case called - defts present with counsel - Trial ordered and BEGUN - Jurors selected and sworn - Defts motion for Mistrial - Motion denied - defts open - Trial contd to Jan. 8, 1974.
1-8-74	Letter of Dec. 28, 1973 filed from David Jordan, Appeals Bureau to Michael Gillen Esq. and letter same date to Hon. Lewis Orgel from David Jordan etc. filed (both recvd from Chambers)
1-8-74	Before DOOLING J - Case called - defts present with counsels - Trial resumed - Trial continued to Jan. 9, 1974.
1-9-74	Before DOOLING J - Case called - defts present with counsel - Trial resumed - trial contd to Jan. 10, 1974.
1-10-74	Before DOOLING, J. - Case called - Defts and counsel present - Trial resume Trial contd to 1-11-74
1-11-74	Before DOOLING, J. - Case called - Defts and counsel present - Trial resumed
<del>1-11-74</del>	<del>Before DOOLING, J. - Case called - Defts and counsel present - Trial resumed</del>
1-14-74	Before DOOLING J - Case called - defts & counsels present - trial resumed - Trial continued to 1-15-74.
1-15-74	Before DOOLING, J. - Case called - Defts and counsels present - Trial resumed Trial contd to 1-17-74
1-17-74	Before DOOLING J - Case called - trial resumed - defts & counsels present - Trial continued to Jan. 18, 1974.
1-18-74	Before DOOLING J - case called - trial resumed - Govt rests - Defts move for Judgment of Acquittal - decision reserved - R. Fischett, Esq. moves to strike testimony of Taibbi - denied. Trial contd to Jan. 21, 1974.
1-21-74	Before DOOLING J - case called - trial resumed - defts rest - defts move for Judgment of Acquittal - motion denied.
1-21-74	Request No. 1, Request No. 2 and Request No. 3 filed.
1-22-74	Before DOOLING J - Case called - trial resumed - defts summation - Govts summation - defts move for declaration of a Mistrial - Motion denied - trial contd to Jan. 23, 1974.
1/23/74	Before DOOLING, J. - Case called - Trial resumed - Jury deliberates to 1/24/74
1/23/74	By DOOLING, J. - Order of Sustenance filed.
1-24-74	12 volumes of stenographers transcripts filed (pgs 1 to 2124)
1-24-74	Before DOOLING J - case called - trial resumed - Jury deliberation resumed Jury reports disagreement - defts move for Mistrial - Motion denied (Allen Charge given) Order of Sustenance signed.



DATE	PROCEEDINGS
	Jury returns with a verdict of guilty as to defts JOHN & THOMAS McNAMARA & ALPHONSE MEROLLA and with a verdict of not guilty as to defts ANGELO & ROCCO MEROLLA and report unabel to arrive at a verdict as to deft JOHN DE LISO. Defts. JOHN & THOMAS McNAMARA, ALPHONSE MEROLLA & DeLISO move for a Mistrial - Motion granted - Mistrial declared - Trial concluded - Jury discharged - Bail exonerated as to defts ANGELO AND ROCCO MEROLLA - defts JOHN & THOMAS McNAMARA, DE LISO, ALPHONSE MEROLLA contd on bail.
1-25-74	2 Orders of Sustenance filed (for lunch and transportation)
1-24-74	By DOOLING J - & Judgment of Acquittal filed (ANGELO & ROCCO MEROLLA)
1-28-74	Govts Memorandum of Law filed.
1-28-74	Stenographers transcript filed dated Jan. 24, 1974. (pgs 2125 to 2180a)
2-1-74	<del>Stenographers transcript filed dated Jan. 24, 1974.</del> Govts Memorandum of Law filed.
3-11-74	Before Dooling J - case called - Conference held and contd to March 21, 1974.
3-21-74	Before DOOLING, J. - Case called. Defts DeLiso and Merolla and counsel <sup>Alphonse</sup> Fishetti present - Deft McNamara and counsel Gillen present - Deft Thomas McNamara not present. counsel Hoey present - Defts after being advised of their rights by the court, Mr. Hoey for Thomas McNamara waive their right to a trial within 90 days of disagreement - Scheduled for trial on 10-7-74 Pre-trial conference scheduled for 9-3-74
3-22-74	Copy of letter filed received from Chambers to John Leone Esq. stating trial date of this case was set for Oct. 7, 1974 and Govt moved without objection to consolidate the trial of 73 CR-1066 with the retrial - and presently scheduled trial date of April 29, 1974 for 73 CR-1066 as released (letter in this filed)
5-2-74	Letter dated 4-30-74 filed from J. Timothy Shea, Esq. re deft McNamara indicating that deft wishes to inform the court re 2 weeks vacation, etc. (received from Chambers)
5-10-74	BY DOOLING J - Order of substitution filed (substituting Leonard J. Meiselman Esq. for deft <sup>Thomas</sup> McNamara in place of John Hoey, Esq.)
6-1-74	Letter from Judge Dooling to deft Alphonse Merolla filed re: ability of deft to retain counsel
7-8-74	Return receipt from Alphonse Merolla filed.
7-23-74	Memorandum to all counsel filed signed by Judge Dooling that a conference is scheduled for Tuesday, Sept. 3, 1974 at 10:00 am. The trial of this case is scheduled for Monday, Oct. 7, 1974 at 10:00 am.

- 8-26-74 Copy of letter filed dated 8-26-74 to deft Merrolla, Alphonse ,  
from Judge Dooling to the effect that Pre Trial Conference  
is scheduled on Sept. 3, 1974 and presence of the deft is  
expected.
- 9-3-74 Before DOOLING, J.- Case called- Deft John De Liso and counsel R. Fischetti  
Defts and counsel present- deft McNamara not present, counsel present-  
73CR442 and 73CR1066- Deft THOMAS MCNAMARA by counsel moves to dismiss  
the indictment for lack of jurisdiction, other defts join in motion- deft  
to file papers by 9-17-74- Govt to answer by 9-20-74- Argument on motion  
for 9-20-74-
- 9-16-74 Notice of motion for an order dismissing the indictment and Memorandum  
of law filed- ret. 9-20-74 )THOMAS MC NAMARA)
- 9/18/74 By DOOLING, J.- Memorandum and Order dated Sept. 17, 1974 filed  
that the govt has in effect taken the pre-trial deposition of a known  
witness in circumstances not permitted by Rule 15, etc.
- 9-20-74 Before DOOLING, J.- Case called- Defts and counsel present- Motions  
argued- granted and denied as indicated on record- case adjd to 10-7-74  
for trial
- 9-23-74 Letter to all defense counsel from Law Clerk of Judge Dooling and  
accompanying photocopies of 3 index cards filed
- 9-23-74 Stenographers transcript filed dated 9-20-74.
- 9-24-74 Memorandum filed to all defense counsel (dated 9-23-74) from  
Law Clrk to Judge Dooling and ~~index~~ <sup>folder</sup> page etc.
- 9/27/74 Govt's Memorandum in Opposition to deft's motion to dismiss the indictment  
for want of Federal Jurisdiction filed.
- 9-30-74 By DOOLING, J.- Memorandum and Order filed denying deft Thomas McNamara's  
motion to dismiss
- 10-7-74 Govts Memorandum of Law filed.
- 10-7-74 Before DOOLING J - case called - deft John De Liso & counsel  
R. Fischetti present; deft John McNamara & counsel M. Gillen  
present; deft Thomas McNamara & counsel L. Meiselman present;  
deft Alphonse Merrolla and counsel J. Leone present; deft  
Alphonse Merrolla and counsel M. Seltzer of Legal Aid present.  
counsel for deft McNamara moves for dismissal of the indictment -  
motion denied - Govt moves to sever as to deft John McNamara -  
motion granted - Jury selection begun not completed - trial contd  
to October 8, 1974.



DATE	PROCEEDINGS
10-8-74	Stenographers transcript filed dated 10-7-74.
10-8-74	Before DOOLING J - case called - Defts & attys present - (case as to deft John McNamara severed) Trial resumed - Jurors selected and sworn - Govts opening - Defts De Liso, Thomas McNamara & Alphonse M. Merolla opening - deft Alphonse Merolla waives opening statement. Trial contd to Oct. 9, 1974.
10/9/74	Before DOOLING, J.- Case called-Defts and counsel present-Trial resumed Trial contd to 10/10/74
10/9/74	Stenographers Transcript dated 10/8/74 filed
10/10/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Trial contd to 10/11/74
10-11-74	Stenographers transcript filed dated Oct. 10, 1974.
10-11-74	Stenographers transcript filed dated Oct. 9, 1974
10/11/74	Before DOOLING, J. Case called- Defts and counsel present- Trial resumed Trial contd to 10/15/74
10/15/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Deft ALPHONSE MEROLLA moves to suppress his identification by agent- Hearing ordered and begun- on motion to suppress-Hearing concluded- Motion to suppress denied- Trial contd to 10/16/74
10/16/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Trial contd to 10/17/74
10/17/74	Before DOOLING, J.- Case called- Defts and counsel present- Trial resumed Trial contd to 10/18/74
10/18/74	Before DOOLING, J.- Case called- Defts and counsel present-Govt rests- Deft move for judgment of acquittal- Decision reserved- Trial contd to 10/21/74
10-21-74	Before DOOLING J - case called - defts & counsels present - trial resumed - Deft McNamara rests - Deft De Liso moves for the court to inform the Jury that Angelo & Rocco Merolla were acquitted at the prior trial or that that information be elicited from a witness - defts Alphonse M. Merolla & Alphonse Merolla join in deft De Liso's motion - motion denied - defts DE LISO ALPHONSE M. & ALPHONSE MEROLLA rest. Defts all renew motions for judgment of acquittal and for dismissal of the complaint - and to strike the testimony of Harold Goberman - Decision reserved - summation for deft THOMAS McNamara - trial contd to Oct. 22, 1974
10-22-74	Before DOOLING J - case called - trial resumed - defts present with attys - summation for defts - summation for Govt - Jury charged - Order of Suspense signed
10-22-74	Before DOOLING J - Order of Suspense signed

- 10-23-74 Before DOOLING J - case called - defts & attys present - trial resumed - Jury deliberations resumed - Order of Sustenance signed - Jury returns with verdicts of not guilty as to defts. DE LISO & ALPHONSE MEROLLA and verdicts of Guilty as to defts THOMAS MC NAMARA & ALPHONSE M. MEROLLA. Jury polled - Jury discharged - Trial concluded - Bail exonerated as to defts DE LISO & ALPHONSE MEROLLA - bail continued as to defts MC NAMARA & ALPHONSE M. MEROLLA Defts MC NAMARA & ALPHONSE MEROLLA moved to dismiss on interstate commerce reserved issues and to set aside the verdict and for Judgment of Acquittal - Decision Reserved - deft MC NAMARA Moves to dismiss the Indictment for lack of prosecution or an immediate trial. Motion to dismiss for lack of prosecution denied without prejudice with leave to renew - case as to deft John McNamara scheduled for trial on Feb. 10, 1975
- 10-23-74 By DOOLING J - Order of sustenance filed - lunch-14 persons.
- 10-23-74 By DOOLING J - Judgment of Acquittal filed (DE LISO & ALPHONSE MEROLLA.)
- 11/7/74 Stenographer's transcripts of 10/21/74, 10/22/74 and 10/23/74 filed.
- 11/7/74 Voucher for expert services filed
- 11/7/74 Stenographers Transcript dated 10/11/74, 10/15/74, 10/16/74, 10/17/74 and 10/18/74 filed
- 1-3-75 Before DOOLING J - case called - deft ALPHONSE MEROLLA & counsel Marion Seltzer of Legal Aid present; deft renews motion to dismiss, Judgment of Acquittal, set aside the verdicts, etc. Motions denied. Deft is sentenced to imprisonment for 3 years pursuant to 18:3651; deft to serve 3 months in a jail type institution and execution of remainder of sentence, that is 33 months, is suspended and the deft is placed on probation for 5 years. Clerk is directed to file a Notice of Appeal forthwith on defts behalf without fee. Bail contd pending appeal.
- 1-3-75 Judgment and Commitment and Order of Probation filed - certified copies to Marshal and Probation (ALPHONSE MEROLLA)
- 1-3-75 Notice of Appeal filed without fee (ALPHONSE MEROLLA)
- 1-3-75 Docket entries and duplicate of Notice mailed to the C of A (ALPHONSE MEROLLA)
- 1-3-75 Before DOOLING J - sentence adjd to Jan. 10, 1975 as to deft THOMAS MC NAMARA.



DATE	PROCEEDINGS
-10-75	Before DOOLING J - case called - deft Thomas Michael McNamara & counsel Leonard Meiselman present - deft renews motion previously made - motions denied - Deft is sentenced to 3 years imprisonment pursuant to 18:3651 - deft to serve 3 months to a jail type institution and execution of the remainder of sentence, that is, 33 months is suspended and the deft is placed on probation for 33 months and deft is fined \$5,000. Deft to execute a P.A. Bond of \$10,000. Execution of sentence stayed pending appeal, limits extended to include all of the U.S. Trial date as to deft John McNamara previously set for 2-10-75 adjd without date pending approval of Washington for dismissal.
1-10-75	Judgment and Commitment and Order of Probation filed - certified copies to Marshal and Probation (THOMAS McNAMARA)
1/14/75	Notice of appeal filed (THOMAS McNAMARA)
1/14/75	Docket entries and duplicate of notice of appeal mailed to court of appeals (THOMAS McNAMARA)
1/22/75	Record on appeal certified and mailed to court of appeals

A TRUE COPY	
ATTEST	
DATED	1/27/75
LEWIS C. GLENN	
BY	[Signature]
DEPUTY CLERK	

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA

-vs-

JOHN DE LISO  
JOHN MC NAMARA  
THOMAS MC NAMARA  
ALPHONSE MEROLLA  
ANGELO MEROLLA  
ROCCO MEROLLA,

Defendants  
-----X

INDICTMENT

18 U.S.C. §§1951,

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.

★ MAY 2 1973 ★

TIME A.M. ....  
P.M. ....

**73 CR 442**

THE GRAND JURY CHARGES:

COUNT I

1. That from on or about March 1, 1972, up to and including June 28, 1972, both dates being approximate and inclusive, within the Eastern District of New York, HarMac Contracting Corporation was engaged in the construction and preparation for construction of a building on behalf of the defendant THOMAS MC NAMARA and the Mc Namara Re New Cars, Incorporated which building was to be utilized in connection with the service and sale of new automobiles, parts of which were to be manufactured in other states and transported in interstate commerce to the said building and that for the purpose of performing the aforesaid building construction, the HarMac Contracting Corporation, transported, moved and caused to be moved, articles, commodities and materials, supplies, men and machinery in interstate commerce between various parts of the United States and the State of New York to the site of said building construction within the State of New York.

2. At all times pertinent hereto, Harold Goberman was the sole shareholder in and president of the HarMac Contracting Corporation and a party in the contract with Mc Namara Re New Cars, Incorporated for the construction of the building mentioned in paragraph one, whose interests in and under the contract were assigned to the HarMac Contracting Corporation.

3. From on or about June 1, 1972, up to and including the date of the filing of this indictment, both dates being approximate and inclusive, in the Eastern District of New York, the defendant JOHN DE LISO, the defendant JOHN MC NAMARA, the defendant THOMAS MC NAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with one another and with divers other persons to the Grand Jury unknown, to obstruct, delay and affect



commerce and the movement of articles and commodities in such commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code.

4. It was a part of the said conspiracy that the defendant JOHN DE LISO, the defendant JOHN MC NAMARA, the defendant THOMAS MC NAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, and other co-conspirators would obtain the property of the HarMac Contracting Corporation and of Harold Goberman, to wit, 1) the sum of \$1300 which was the property of HarMac Contracting Corporation; 2) a trailer-type vehicle, which was the property of Harold Goberman and was utilized in the construction of the building mentioned in paragraph one; 3) a contract release, which was executed by Harold Goberman on June 28, 1972 which released the defendant THOMAS MC NAMARA and Mc Namara Re New Cars, Incorporated from contractual obligations in excess of \$25,000 for a consideration of \$25,000 and; 4) other goods and services as requested by the defendant THOMAS MC NAMARA, which were not contractually required; all of which property was to be obtained with the consent of Harold Goberman and of HarMac Contracting Corporation, such consent to be induced by the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman and of the HarMac Contracting Corporation, by the said defendants and co-conspirators, unless and until the said HarMac Contracting Corporation and Harold Goberman, gave such properties to the defendant THOMAS MC NAMARA and Mc Namara Re New Cars, Incorporated.

(Title 18, United States Code, Section 1951)

A TRUE BILL

FOREMAN

*Robert A. Morse*  
ROBERT A. MORSE  
UNITED STATES ATTORNEY

1

## Charge

2 Members of the jury:

3 You have heard the evidence in the case and  
4 the arguments of counsel and now must receive the  
5 instructions on the law that governs the case.

6 You, the jurors, are the sole judges of the  
7 facts. You must, however, follow the law as given  
8 to you in these instructions and apply it to the facts  
9 as you find them from the evidence before you. You  
10 are not free, nor am I, to substitute our private  
11 judgments as to what the law should be for what the  
12 law in fact is.

13 You have been sworn as jurors well and truly  
14 to try this case and to render a true verdict. You  
15 must therefore exclude from your deliberations all  
16 bias and prejudice. You must not permit yourselves  
17 to be governed by sympathy or any other considera-  
18 tions not founded in the evidence and these instructions  
19 on the law.

20 The issues of the fact to be tried are those  
21 made by the indictment and the defendants' pleas of  
22 "Not Guilty." Bear in mind that the indictment is  
23 the formal method of accusing a person of crime; it  
24 is not itself evidence that a defendant committed  
25 the crime; it is not itself evidence that a defendant



committed the crime charge, nor is the fact that the indictment was found any evidence of guilt.

The indictment is found under 1951 of Title 18 of United States Code and it charges a conspiracy to obstruct or delay or affect the movement of articles in commerce by extortion. The statute defines an extortion in the following words:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, of fear ..."

Under the statute and in the indictment the word commerce has reference to interstate commerce, that is, between a point in one state and a point in another state. Section 1951 defines the offense with which we are here concerned in the following words:

"Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article, ... in commerce, by .... extortion ... or conspires so to do ... shall be fined ... or imprisoned ... or both."

Turning now to the indictment, copies of which will be given to you when you retire to con-

sider your verdict, the first paragraph is directed to alleging matter intended to show the nature of the interstate commerce claimed to be involved in the case. It reads in the following language:

(Read Paragraph 1)

The second paragraph identifies Mr. Goberman and HarMac. It reads in the following language:

(Read Paragraph 2)

Paragraph 3 of the indictment is what is called the charging paragraph and it is drawn in language which is very close to the language of the Statute. It reads as follows:

(Read Paragraph 3 of the Indictment.)

Paragraph Fourth of the indictment finally contains the allegations describing the conspiracy which the Government charged in general terms in Paragraph 3. It reads as follows:

(Read Paragraph 4)

There are four defendants here and you must consider the case as against each defendant separately. The evidence is not identical as to the defendants and you must evaluate it as it affects each defendant separately. Your verdict need not be the same as to all defendants.



1  
2 You will observe that the defendants are  
3 charged with a conspiracy to commit the offense of  
4 the statute. A conspiracy is a combination of two or  
5 more persons to accomplish through concerting their  
6 actions, some unlawful purpose, or some lawful pur-  
7 pose by concerted use of unlawful means.

8 The Government is not required to show that the  
9 persons charged to have conspired together entered  
10 inot an express or formal agrrement or that they  
11 directly by spoken or written words agreed among  
12 tehmselves on what their object or purpose was and  
13 agreed on the details of how they would go about  
14 accomplishing it.

15 But the Government must show beyond a reasonable  
16 doubt in order to prove a conspiracy that two or more  
17 of the persons charged as co-conspirators in some way  
18 or manner, whether by tacit arrangement or outspoken  
19 exchanges, came to a mutual understanding that they  
20 would, by acting together, accomplish an unlawful  
21 purpose or together join in using unlawful means to  
22 gain a lawful end.

23 The conspiracy proved must be substantially that  
24 described in the indictment. The Government does not,  
25 however, have to prove that each and every person  
named as a defendant or co-conspirator in fact

1 participated in the formation and carrying out of  
2 the conspiracy so long as it does satisfy you beyond  
3 a reasonable doubt that two or more of the  
4 defendants on trial or any one of the defendants on  
5 trial and another person charged as a co-conspirator  
6 did form substantially the conspiracy described in  
7 the indictment and put it into execution.  
8

9 So far as concerns each defendant separately  
10 considered, the Government must prove as against him  
11 individually that there was a conspiracy and also  
12 that the particular defendant whose case you are  
13 considering joined in and became a member of the  
14 conspiracy.  
15

16 That the Government must prove beyond a  
17 reasonable doubt by competent evidence offered against  
18 that defendant through witnesses who heard him speak  
19 and saw him act and who testify before you to acts  
20 and words of that defendant which satisfy you that  
21 he did in fact become a member of the conspiracy.

22 Once the Government has shown beyond a  
23 reasonable doubt that a conspiracy was formed and  
24 the defendant whose case you are considering joined  
25 in it, then he is responsible not only for his own  
words and acts spoken and performed in carrying out  
the conspiracy but for the acts and words of his co-



conspirators performed and spoken in carrying out the conspiracy.

The essential elements of the charge of the indictment all of which the Government must prove beyond a reasonable doubt or else you must acquit the defendant whose case you are considering are the following:

First, that physical violence and threats of physical injury were used to induce Harold Goberman to do one or more of the following things, that is, to sign and deliver the \$1,300.00 check, or sign and deliver the bill of sale of the trailer, or to sign and deliver the cancellation of the construction contract;

Second, that two or more of the defendants named in the indictment conspired so to use violence or threats of injury to obtain the check or bill of sale or contract cancellation or any two or all three of these instruments from Goberman for the purpose of preventing Goberman and HarMac Contracting Corporation from continuing with the construction of the building for McNamara Buick;

Third, that the effect of the use of the acts of the conspirators directed against Goberman would

1  
2 in some degree or manner delay, obstruct or affect  
3 in some way interstate commerce or other movement of  
4 any articles in interstate commerce; and

5 Fourth, that the defendant whose case you are  
6 considering joined the conspiracy knowing its terms  
7 and its purpose and that it contemplated the use of  
8 physical violence and threats or physical injury in  
9 order to induce Harold Goberman to act as the  
10 conspirators directed.

11 If the Government proves all four essential  
12 elements of the charge against the defendant whose  
13 case you are considering, beyond a reasonable doubt,  
14 then you will find that defendant guilty.

15 If, however, the Government fails to prove any  
16 one or more or all four essential elements beyond a  
17 reasonable doubt as against the defendant whose case  
18 you are considering, then you must acquit that  
19 defendant.

20 In this case the charge is conspiracy and  
21 conspiracy ordinarily does not necessarily involve  
22 evidence that the alleged conspirators actually went  
23 on and did the things that they conspired to do. That  
24 is because conspiracy is itself a complete crime even  
25 if for some reason it fails to be carried out. I do  
not understand, however, that in this case the



Government contends that it has introduced evidence which would prove conspiracy apart from the evidence of the threats and acts of violence against Harold Goberman and the evidence of the matters connected with and related to the evidence of threats and violence.

Accordingly, the first essential element requires you to determine from all the evidence whether you find that the Government has shown that physical violence and threats of physical injury were used to induce Harold Govermen to sign and deliver the \$1,300.00 check on June 5, 1972, or the trailer bill of sale on that day or to sign and deliver the contract cancellation or release on June 23, 1972.

Note particularly that the Government need not prove both episodes. It is enough if it proves beyond a reasonable doubt that on either one of the two occasions physical violence or a threat of injury was used to get on the one occasion either the check or the bill of sale and on the other the contract cancellation.

If you conclude that the Government has failed to prove beyond a reasonable doubt that physical violence or a threat of physical injury was used to

1  
2 get the check of bill or sale or contract  
3 cancellation, then you must acquit all the defendants.

4 If you find that the Government has proved  
5 this first essential element beyond a reason-  
6 able doubt, then you go on to the second element.

7 The second essential element requires proof  
8 that a conspiracy of two or more persons involving  
9 at least one defendant was formed to get the checks  
10 or bill of sale or contract cancellation from  
11 Goberman by violence or threats of injury for the  
12 purpose of preventing him and HarMac from continuing  
13 with the building construction on Nesconset Highway.

14 You must, looking at all the evidence, decide  
15 whether such a conspiracy was formed. It is not  
16 contended that the Government has shown you any  
17 formal agreement to do the things alleged, and it  
18 need not do so. But it must prove facts and  
19 circumstances from which you are able to and do infer  
20 beyond a reasonable doubt that defendants, or at  
21 least one defendant and another person named as a  
22 co-conspirator were concerting their activities to  
23 extort from Harold Goberman the check or bill of  
24 sale or contract release by using physical violence  
25 on him or threats of injury, with the purpose of



1  
2 preventing him and his company from continuing on the  
3 McNamara Buick job. In deciding whether the second  
4 element has been proved you consider all the evidence  
5 of the acts performed by each defendant, the words  
6 they used, and the occasions, if any, on which you  
7 find that they were present together and acted as a  
8 group.

9 If you conclude that the Government has failed  
10 to prove such a conspiracy beyond a reasonable doubt,  
11 then you must acquit all the defendants. If you  
12 find that the Government has proved a conspiracy, then  
13 you turn to the third element.

14 The statute requires proof of a delay,  
15 obstruction or some affectation of interstate  
16 commerce or of the movement of articles in interstate  
17 commerce as a result that would naturally flow from the  
18 acts charged.

19 It is not necessary for the Government to show  
20 that the defendants or any of them thought about  
21 interstate commerce or the shipment of automotive  
22 parts or building materials from outside New York  
23 to Nesconset Highway or deliberately planned to delay,  
24 obstruct or affect it.

25 But if the very nature of the acts charged

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2  
3 would in any manner or degree delay, obstruct or  
4 affect commerce, and you find that the persons, if  
5 any, whom you find to have conspired did conspire to  
6 commit the acts that would have that affect, then the  
7 third element is proved.

8       So here, if you find that the first and  
9 second essential elements have been proved beyond a  
10 reasonable doubt, and if you further find that (a)  
11 automobile parts were regularly being shipped from  
12 outside New York to McNamara Buick-Pontiac in Port  
13 Jefferson and were to be shipped to the Nesconset  
14 Highway site as soon as the new building was  
15 completed, or (b) if you find that building materials  
16 from outside New York were ordered specifically for  
17 the Nesconset Highway job and had been shipped to the  
18 job site for erection as part of the building, and all  
19 had been delivered to the job but had not been com-  
20 pletely erected on the job site by June 28, then as  
21 a matter of law you may find that the Government has  
22 established the third essential element beyond a  
23 reasonable doubt. That is because any interference  
24 with the performance of a building contract involving  
25 the use of materials ordered and shipped from out  
of the state specifically for that building and with



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2 the identity of the person or company who would  
3 complete the contract performance might be found by  
4 you in fact in some way or degree to affect the  
5 completion of the building and the time of the shift  
6 of deliveries of automotive parts in commerce from  
7 Port Jefferson to Nesconset Highway.

8 If you find that the Government has failed  
9 to prove the third essential element beyond a  
10 reasonable doubt, then you must acquit the defendants.

11 The fourth essential element requires you to  
12 determine separately as to each defendant whether  
13 that defendant was a willing participant in the  
14 conspiracy, whether, knowing its purpose and terms that  
15 it contemplated the use of physical violence and  
16 threats of physical injury to Harold Goberman, he  
17 took an active part in the conspiracy.

18 To determine this question you must review as  
19 to each defendant the testimony of those witnesses  
20 who gave evidence of that defendant's words and acts  
21 as he heard and observed the, and the exhibits, if  
22 any, that affect that defendant, and, reviewing that  
23 material against all the background of all the other  
24 evidence, you must then decide whether that  
25 defendant has been shown beyond a reasonable doubt  
to have been a member of the conspiracy.

1  
2 If so, you will find the defendant guilty, if  
3 not, you must acquit the defendant.

4 (Insert before last paragraph)

5 It is not enough for the Government to show  
6 that a defendant was present during the commission  
7 of a crime, even if it is also shown that he must  
8 have known that a crime was being committed. It  
9 must be shown the defendant affirmatively associated  
10 himself with the criminal venture and concerted  
11 his efforts with one or more others to further the  
12 objective of the conspiracy.

13 There has been evidence presented to indicate  
14 that Harold Goberman was himself a person who had  
15 used violence, threats of violence and dangerous  
16 weapons in the past, and that he may have made such  
17 threats against Thomas McNamara, and there has been  
18 evidence that in the performance of the construction  
19 contract the defendants McNamara believed that they  
20 could show that Goberman and HarMac had not paid  
21 their subsonctractors bug had falsely certified that  
22 they had paid them and on that basis received sub-  
23 stantial progress payments on the job requisitions,  
24 and there has been evidence that Thomas McNamara  
25 believed that the work was not carried out in



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2  
3 accordance with the plans and specifications and  
4 the requirements of the Town Building Code.

5 These are not matters which would afford  
6 the defendants or any of them an excuse or defense  
7 for violating the law as set forth in Section 1951 if  
8 you were to find that these matters were as the  
9 defendants say, of, if you conclude that the Govern-  
10 ment has failed to show that the defendants'  
11 assertions were false assertions as to the facts or  
12 as to the defendants' belief.

13 It may be that Harold Goverman and HarMac had  
14 very seriously breached the contract with McNamara  
15 Re New Cars, Inc.; departed from the plans and failed  
16 to meet code requirements, and, that, in consequence,  
17 McNamara Re New Cars, Inc., had the right to  
18 terminate the contract, to declare it at an end, sue  
19 Goberman and HarMac for damages and complete the  
20 building by other means.

21 But that would not legitimatize the use of  
22 physical violence or threats of physical injury in order  
23 to get from Harold Goberman the \$1,300.00 check, or the  
24 bill of sale or the signed contract cancellation; to  
25 put it another way, would not legitimatize defendants  
in attempting by force to coerce Harold Goverman and

1  
2 HarMac into surrendering their right to contest and  
3 defend themselves against those charges and to retain  
4 their money, property and contract rights until the  
5 rights of the parties were adjusted by private,  
6 uncoerced agreement between them or by civil  
7 litigation.

8 Similarly, if Harold Goverman did resort to  
9 violence, he may have exposed himself to prosecution,  
10 but that does not excuse the defendants from their  
11 duty to comply with the laws, including Section 1951.  
12 However, if you were to conclude from the evidence  
13 that there were only repeated heated arguments,  
14 and threats that were unreal, or were to conclude  
15 that, if there was any violence, it arose of violent  
16 contract disputes and was not connected with and  
17 used to induce the signing and delivery of the check  
18 or bill of sale or contract cancellation, that would  
19 not amount to the extortion of violence with which  
20 Section 1951 deals.

21 To repeat, what is charged and what must be  
22 shown is that physical violence and threats of  
23 physical injury were used to induce Harold Goberman  
24 to sign and deliver the check or bill of sale or  
25 contract cancellation and if you are satisfied that



1  
2 the Government has proved that, it is immaterial that  
3 Gorman may himself be a violent man and at certain  
4 times may have uttered threats of violence against  
5 Thomas McNamara.

6 And an attempt to suppress evidence made by a  
7 defendant after a crime has been committed is not,  
8 of course, sufficient to establish that defendant's  
9 guilt.

10 If, however, you conclude here that a  
11 defendant made a conscious effort to suppress a  
12 document that he thought might be used against him,  
13 you may consider the evidence of any such attempt,  
14 along with the other evidence in the case in determin-  
15 ing the issue of his guilt or innocence. Whether  
16 or not an attempt at suppression of evidence shows a  
17 consciousness of guilt and the significance to be  
18 attached to any such attempt, are matters for you to  
19 determine.

20 When a defendant knows that a matter is the  
21 subject of a criminal investigation and voluntarily  
22 and intentionally offers an explanation intended and  
23 tending to show his innocence of wrongdoing or to  
24 disassociate himself from a suspected wrongdoer, and  
25 the explanation or statement is shown to you to be

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2 false, you may consider whether the offering of such  
3 a false statement is a circumstance indicating  
4 consciousness of guilt.

5 Ordinarily, it is reasonable to infer that an  
6 innocent person would not think it necessary to  
7 invent or fabricate an explanation or make a state-  
8 ment tending to establish his innocence that was untrue

9 Whether or not the evidence does demonstrate  
10 the making of a consciously false statement is for you  
11 to say and whether the fact or the making of such a  
12 statement if you find that it was made and was false  
13 points to a consciousness of guilt and the signifi-  
14 cance to be attached to such evidence are matters  
15 exclusively within your province to determine.

16 Proof beyond a reasonable doubt is not proof  
17 to an absolute certainty. Few things in life can be  
18 so proved. Proof beyond a reasonable doubt is such  
19 proof as you would be willing to rely and act upon  
20 in the most important of your own affairs.

21 If, after carefully weighing all the evidence  
22 you have an abiding conviction of the truth of the  
23 charge such that you feel conscientiously bound to  
24 act upon it, then you would be free from reasonable  
25 doubt.



1  
2 If, however, after weighing all the evidence,  
3 you have such a doubt as would cause prudent persons  
4 to hesitate before acting in matters of importance  
5 to themselves, such a doubt would be a reasonable  
6 doubt.

7 That does not mean that each bit of the  
8 Government's evidence must be found by you to be  
9 true beyond a reasonable doubt. It means rather that  
10 in sum total the Government's evidence must satisfy  
11 you beyond a reasonable doubt as to each element of  
12 the crime charged, or you must acquit.

13 A reasonable doubt may arise not only from the  
14 evidence produced, but also from the lack of evidence.  
15 Since the burden of proof is always on the Government  
16 a defendant has the right to rely on the failure of  
17 the Government to prove any essential element of the  
18 charge.

19 A defendant may rely too on evidence brought  
20 out on his cross-examination of witnesses called by  
21 the Government. The law does not impose on a  
22 defendant the burden or duty of producing any  
23 evidence.

24 Under our law a defendant has a constitutional  
25 right to remain silent. No inference unfavorable to

1  
2 the defendant can be drawn from that fact. Your  
3 deliberations accordingly must exclude consideration  
4 of or reference to the matter and must concern itself  
5 solely with the evidence before you.

6 A defendant is presumed to be innocent and  
7 that presumption accompanies him/her throughout the  
8 trial. It continues unless you are satisfied on  
9 all the evidence that the Government has proved  
10 defendant's guilt beyond a reasonable doubt.

11 I will not summarize the evidence. It has  
12 not been complex and the issues of fact are plain.  
13 You have heard twenty-seven witnesses, to name them  
14 in the order in which they testified; Richard  
15 Anderson, Frank Cifarelli, George Little, Harold  
16 Goberman, Alex Guiazdowski, Gary P. Taibbi, Edward  
17 Tew, John G. Ehrlich, Biaggio Punturo, Desmond  
18 O'Sullivan, Allen Goberman, Richard M. McMullen,  
19 Emanuel G. Sfaelos, Warren M. Brady, Jeremiah Murphy,  
20 Thomas Patrick Gill, John Timothy Shea, John Sini,  
21 Sandra Di Nuzio, Majes V. Pavese, George W. Koch,  
22 Dorothea H. Tomaselli, Andrew S. Camarda, James  
23 McNamara, Kenneth Brown, James Freda and Eugene W.  
24 Brosi. Sixty exhibits have been received.

25 I have emphasized that you must decide the



case on the evidence.

The evidence is the testimony of these witnesses, the exhibits received in evidence, and the facts that have been stipulated.

Statements and arguments of counsel, and answers stricken from the record are not evidence.

The evidence includes, of course, what is brought out on cross-examination as well as what is testified under direct examination.

Your verdict must be based on the evidence. But in your consideration of the evidence you are not limited to the bare words of the witnesses and the bald facts that you find have been proved. The evidence includes the inferences reasonably to be drawn from the testimony which you hear and the facts which you find have been proved.

There are two types of evidence from which you may lawfully find that a fact has been proven. One is direct evidence, such as the testimony of an eye witness to his observations of the facts to be proved. The other is circumstantial evidence, the proof of facts and circumstances which rationally imply the existence or non-existence of some other fact because such other fact usually and reasonably

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2 follows according to the common experience of  
3 mankind. Thus, if you see people coming into a  
4 building shaking out dripping umbrellas, and others,  
5 about to go out-of-doors, turning back toward their  
6 offices, you infer from these circumstances that it  
7 is raining outside.

8 Or, while you can see from your window that  
9 the sky is full of clouds and the streets are wet,  
10 and you see also that passing cars are not using  
11 their windshield wipers and passersby are carrying  
12 their umbrellas folded under their arms; you infer  
13 from those circumstances that it is not raining.

14 As a general rule the law makes no distinction  
15 between direct and circumstantial evidence. If the  
16 evidence, as here, is in part indirect and circum-  
17 stantial, then you apply to it, along with all the  
18 other evidence, the same standard of proof; it must,  
19 taken with the other evidence, satisfy you of the  
20 defendant's guilt, beyond a reasonable doubt, or else  
21 you must acquit.

22 You are the sole judges of the credibility of  
23 the witnesses. The motives and state of mind of  
24 each witness as they appear to you and the circumstances  
25 and inducements under which the witness testified



1  
2 are to be taken into account. Consider any relation  
3 each witness may bear to either side of the case and  
4 the manner in which the verdict might affect him.

5 You may consider the appearance and manner of  
6 each witness on the witness stand, the witness'  
7 apparent candor or lack of it, and the character of  
8 the testimony given, whether the testimony contains  
9 inconsistencies or discrepancies, whether it is  
10 intrinsically credible or seems to you in whole or  
11 part improbable, and whether it conflicts with other  
12 testimony or is consistent with other testimony in  
13 the case.

14 In weighing the effect of conflict or discrepancy  
15 consider whether it pertains to a matter of importance  
16 or to unimportant details and whether it seems to you  
17 to result from innocent error or from falsehood. If  
18 you find a witness has been mistaken or untruthful,  
19 in all or in part of the testimony given, then you  
20 may give the testimony of that witness such credit,  
21 if any, as you think it deserves in the light of the  
22 nature of and the extent of the defects that you find  
23 in it.

24 Evidence that at an earlier time a witness made  
25 a statement inconsistent with or contradictory of that  
witness's testimony here in your presence justifies

1  
2 you in rejecting the testimony given before you on  
3 that point but does not require you to reject the  
4 testimony.

5 You must decide in the light of the inconsis-  
6 tency and all the other factors bearing on the  
7 credibility of the testimony whether you do or do not  
8 accept it as true. You do not, however, take the  
9 earlier statement as establishing the true facts;  
10 rather, you treat it as at most nullifying the  
11 testimony given in court here.

12 If you conclude that a witness has knowingly  
13 testified falsely concerning any material matter,  
14 you have the right to distrust that witness' testimony  
15 in other particulars. You may reject all the witness'  
16 testimony or give it or parts of it the credence you  
17 think it deserves.

18 In considering the credibility of a witness you  
19 may take into account the fact that he has been  
20 previously convicted of a crime or crimes. You may  
21 also take into account evidence that a witness has  
22 admitted the commission of other acts that were in  
23 violation of the law.

24 I have sought not to comment on the evidence  
25 or to give any impression as to my own view, if I  
have one, of the relative weight of the evidence.



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2 If I have done so, however, you may disregard  
3 it entirely for you are the sole judges of the facts.

4 From time to time in the course of the trial  
5 objections have been made and rulings on evidence  
6 given. Draw no inferences from the comparative  
7 frequency of objections of one or the other side or  
8 from the comparative record in having objections

9 sustained, disregard the question and draw no  
10 inferences from its wording about the answer that  
11 might have been given.

12 Where an objection is overruled, evidence then  
13 received has no special weight just because  
14 unsuccessfully objected to.

15 Your verdict must be unanimous.

16 It is your duty as jurors to consult with one  
17 another and to deliberate with a view to reaching  
18 agreement if you can do so without doing violence  
19 to individual judgment. Each of you must decide  
20 the case for yourself but do so only after an  
21 impartial consideration of the evidence with your  
22 fellow jurors.

23 In the course of your deliberations do not  
24 hesitate to reexamine your own views and change  
25 your opinion if convinced it is erroneous. Your

1  
2 task is one of conscience, and pride of opinion has  
3 no place in matters of conscience. But do not  
4 surrender your honest conviction as to the weight or  
5 effect of evidence solely because of the opinion of  
6 your fellow jurors or for the mere purpose of  
7 returning a verdict.

8 The form of your verdict, which must be given  
9 separately for each defendant, is simple. Your  
10 verdict must be either Guilty or Not Guilty, it must  
11 be given separately as to each defendant, and it  
12 must be unanimous as to each defendant.

13 Your verdict need not be the same as to all  
14 defendants.

15 Your verdict as to each defendant will be  
16 delivered orally here in open court by your foreman  
17 in response to questions which the Deputy Clerk of  
18 Court will address to him.

19 You are not partisans -- you are judges --  
20 judges of the facts. Your sole interest is to  
21 ascertain the truth from the evidence in the case.

22 When you have reached a verdict and are ready  
23 to report, simply advise the Marshal that you have  
24 reached a verdict without disclosing orally or in  
25 writing what your verdict is.



1  
2 Your verdict must not be disclosed to anyone  
3 before you deliver it orally in the Court Room in  
4 response to the questions of the Clerk of the Court.

5 If you wish to communicate with the Court,  
6 do so in writing, using the Foreman, Juror No. 1, as  
7 your intermediary and representative. Notify the  
8 Marshal when you have any such communication.

9 There will now be a short recess during which  
10 counsel will review the charge with me to make  
11 certain that nothing has been omitted or misspoken.  
12 Then you will retire to the jury room to deliberate  
13 your verdict.  
14

15 (Cont'd on next page.)  
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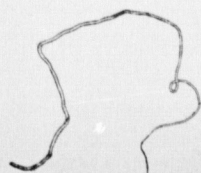
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Charge

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I would ask you not to initiate your discussions yet  
because you have the three alternates with you.  
As soon as the case is given to you and the alternates  
have been excused you will begin your deliberations.





CC

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.  
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UNITED STATES OF AMERICA,

-against-

JOHN DE LISO, JOHN MC NAMARA,  
THOMAS MC NAMARA, ALPHONSE MEROLLA,  
ANGELO MEROLLA, ROCCO MEROLLA,

Defendants.

73 CR 442

MEMORANDUM  
and  
ORDER

UNITED STATES OF AMERICA,

-against-

ALPHONSE MEROLLA  
AKA "FAT NICKY," "PENGUIN"

Defendant.

1. Defendant\* Thomas McNamara moves to dismiss the indictment on the ground that the Court has no jurisdiction (contending that the construction contract had been terminated by notice given under Section 14.2 of the contract on June 24, 1972, and that the town had suspended work on the job by order posted on the job site on June 21, 1972, so that no "affect" on commerce, or on the movement of any articles in commerce, could have occurred on June 28, 1972) and moves also for an examination of the Grand Jury minutes.

On the ground made, the motion must be denied. The

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notice of June 24 could not by its sending and receipt terminate the contract. Even if production of the architect's certificate was excused, the most that McNamara re-New-Cars, Inc., could do by notification would be to assert its position, as the letter plainly did. It could not unilaterally establish its assertion as the legal right of the matter. The letter was not self-fulfilling or self-executing. Hence, the transaction of June 28 was addressed to getting HarMac to relinquish the job. For all that appears, the notice sent by McNamara re New Cars, Inc., could have been an unwarranted repudiation of contract duties that was a breach - and an element in a course of action that interfered with the HarMac performance. .

The town's order was, it appears, a "hold" order, requiring correction of unsafe conditions before continuing construction.

The further question:

whether, assuming that the construction contract itself was made in contemplation of, and if performed would have brought about, (a) the interstate delivery for local erection of substantial quantities of building materials, and (b) the utilization of the completed



structure for the receipt, storage and resale of automotive parts manufactured and shipped from other states,

would using violence to get from Goberman the \$1,300, the trailer, and the contract release be acts sufficiently connected with that commerce to support the indictment under Section 1951? -

that is the question to which attention was invited. United States v. Archer, 2d Cir. 1973, 486 F.2d 670, 677-678, cited by defendant's counsel, dealing with 18 U.S.C. § 1952, and United States v. Maze, 1974, 414 U.S. 395, 399, dealing with 18 U.S.C. § 1341, are both concerned with the question whether the activity furnishing the basis of federal jurisdiction (legislative or judicial) was sufficiently closely and fully connected with the alleged misconduct indicted to support the indictment. In Archer the inquiry was whether the interstate or foreign telephone calls were "of casual and incidental occurrence" or integral to the misconduct indicted; in Maze the question was whether or not the interstate mailing of bills in order to be paid by interstate remittance was merely a consequence or was an integral part of Maze's scheme of using a stolen credit card to get lodging at motels en route from Kentucky to California.

Here, the charge is conspiracy to obstruct, delay and affect commerce and the movement of articles in commerce by extortion, i.e., by obtaining property with consent but consent to be induced by wrongful use of violence and threats of injury to person and property. The evidence is, in the main, that HarMac bought building materials from local suppliers who had it shipped in from out of state either to the job site or to their local storage yards, that most of the shipment was complete, but not the installation, and that, of course, the new facility would import vehicles and parts from other states for resale. The conspiracy was not aimed at commerce: no one conspired to hold up interstate shipments until HarMac was ready to release its contract rights, surrender its trailer, and pay over \$1,300. In some sense what was done (if done as Mr. Goberman testified) did "affect" commerce, but affected it at one remove at least if not at the second remove. Is that enough today? The thinking in Maze and Archer suggests that the decided cases under Section 1951 require serious re-examination.

While the commerce motion must be denied on the ground made, the broader commerce question remains open. The evidence may or may not help us on it.



In any event, as made clear at the hearing, requests to charge on the commerce point are welcome. Is the commerce point in this case, in light of the evidence, a pure question of law that we need not trouble the jurors with? If there are one or more convictions and an appeal, will a verdict that includes a theoretical resolution of commerce - fact questions be an advantage or an embarrassment? Should the commerce "facts" be stipulated to isolate the commerce issue where both sides can shoot at it on the law?

2. The motion of defendant\* John McNamara to dismiss the indictment for prosecutorial misconduct in allegedly tampering with the testimony of a witness who had been called as a defense witness and who could be expected to be called by the defense on re-trial is denied. Assuming that Miss Tomaselli was called in a new matter (# 741,240, but, still, violation of Section 1951), perhaps re-indictment to include the second Alphonse M. Merolla (not subornation of perjury, Section 1622), the evidence adduced through her does not seem appropriate. But, while calling Miss Tomaselli might be thought to have been inadvisable and to go to the very farthest border of the permissible, it does not amount in evident purpose or in probable effect to prejudicial misconduct. The motion

is denied.

3. The motion of defendant\* John McNamara to suppress the use of Miss Tomaselli's Grand Jury testimony at the re-trial is denied. The testimony cannot be effectively used unless to impeach, since Miss Tomaselli is not a defendant, and even if suppressed, would remain available under Walder v. United States, 1954, 347 U.S. 62, 65-66, and Harris v. New York, 1971, 401 U.S. 222.

4. It is suggested that if the Government calls Miss Tomaselli as a witness it be instructed not to examine her as a hostile adverse witness. The point is hypothetical, but, as in every case, whether a witness can be examined as adverse and hostile depends on what happens at the trial. No presumption that a witness is adverse and hostile flows from the fact of employment by a firm owned in whole or part by one or more defendants.

5. Defendant\* Thomas McNamara moved to examine the Grand Jury minutes to determine whether or not the June 24 notification and the Town's posting of its order were facts presented to the jury, and, perhaps, for other purposes. The ground for disclosure of the Grand Jury minutes has been



made out. The motion is denied.

It is so ORDERED.

Brooklyn, New York

September 27, 1974.



U. S. D. J.

\* All defendants have joined in all the motions.

# NOTICE

THIS STRUCTURE OR PREMISES  
VIOLATES THE FOLLOWING LAW

( ) ZONING ORDINANCE

( ) HOUSING ORDINANCE

(X) STATE BUILDING CODE

( ) MULTIPLE RESIDENCE LAW

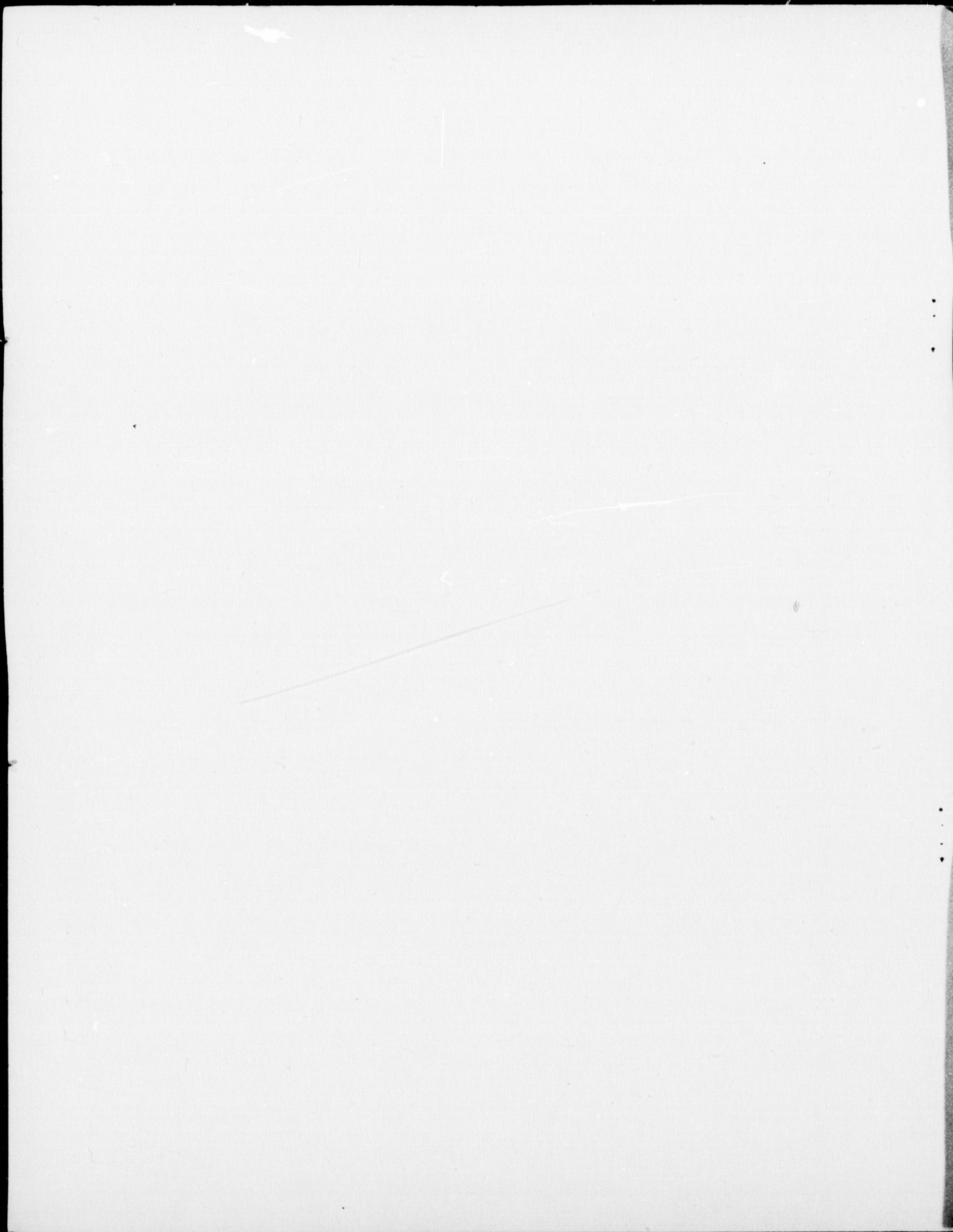
( ) OTHER LAWS \_\_\_\_\_

Part  
ARTICLE 3 SECTION C-301 PARAGRAPH A

DO NOT CONTINUE WITH CONSTRUCTION OR  
USE OF PREMISES UNDER PENALTY OF FINE  
AND IMPRISONMENT OR BOTH

TOWN OF BROOKHAVEN BUILDING DEPARTMENT  
INSPECTOR R. Klein





CERTIFICATE OF SERVICE

March 21, 1975

I certify that a copy of this brief and appendix  
has been mailed to each of the following parties:

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